2001

Reid D. Bench and Alta M. Bench, his wife v. Erma Pace : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

REID D. BENCH and ALTA M. BENCH, his wife,
Plaintiffs and Appellants,

vs.

ERMA PACE,
Defendant and Respondent.

Case No. 13929

RESPONDENT'S BRIEF

Appeal From The Fourth District Court for
Uintah County, State of Utah
Honorable Allen B. Sorensen, Judge

BOYDEN, KENNEDY, ROMNEY
& HOWARD
John S. Boyden
John Paul Kennedy
1000 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133
Attorneys for Defendant-Respondent

RAWLINGS, ROBERTS & BLACK
Suite 400, Ten Broadway Building
Salt Lake City, Utah 84101
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

CASES CITED

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TEXTS CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

REID D. BENCH and ALTA M. BENCH, his wife,
Plaintiffs and Appellants,

vs.

ERMA PACE,
Defendant and Respondent.

Case No. 13929

RESPONDENT'S BRIEF

NATURE OF THE CASE

Plaintiffs in this action sued for specific performance of a Lease-Option Agreement, and Defendant counterclaimed for unlawful detainer, also raising defenses of fraud and mutual mistake.

DISPOSITION IN LOWER COURT

A trial without jury was held before the Honorable Allen B. Sorensen, Judge in the Fourth Judicial District Court, on September 25 and 26, 1974. The Court held that Mrs. Pace, Defendant, had sustained her burden of pursuasion "by clear, satisfactory, definite and

convincing evidence'' that at the time of the execution of the lease option, neither Plaintiffs nor Defendant intended to create an interest in Plaintiffs in the oil, gas and mineral estate in the subject property and that failure of said lease option to contain an express reservation of mineral rights was due to mutual mistake of the parties. The trial court further found that Plaintiffs had failed to properly exercise their option to purchase, and that the Plaintiffs had agreed to remain under the lease arrangement. Findings of Fact, Conclusions of Law and Judgment were entered accordingly, decreeing that (1) the agreement be reformed to conform to the intent of the parties; (2) Plaintiffs are in unlawful detainer; (3) Defendant is entitled to past-due rent; and (4) the lease-option agreement had terminated.

NATURE OF RELIEF SOUGHT ON APPEAL

The Defendant-Respondent seeks an order from this Court affirming the judgment of the trial court.

STATEMENT OF FACTS

Defendant cannot acquiesce in Plaintiffs' Statement of Facts. The omission of pertinent facts supporting the trial court's decision necessarily places Plaintiffs' Statement in the category of Argument. We will endeavor to bring to this Court's attention such missing evidence, together with connecting circumstances deemed essential to establish logical sequence.

Plaintiffs in this action are husband and wife who moved to the Roosevelt, Utah, area in 1965. Defendant

is a widow who owns a small farm northwest of Roosevelt, Utah. The property in question consists of 120 acres with a small home located thereon (T. 76, Ex. 2).[1]

In 1962, Defendant entered into an oil lease (Ex. 1) involving her property. Three years later in September, 1965, Plaintiffs initiated discussions with Defendant for the purpose of leasing Defendant's farm. On September 8, 1965, Plaintiffs, Defendant, and Defendant's son, Aaron Pace, executed a lease with an option to purchase involving the subject property. The lease-option agreement was prepared by an attorney upon the instructions of Plaintiff Reid Bench (T. 17).

The testimony of the Defendant, Erma Pace, her daughter, Dawn Brown, and her former daughter-in-law, Carol Jameson, showed that prior to the execution of the said lease-option agreement, the parties had agreed that no oil, gas, or mineral rights were to be transferred with the property (T. 78, 81, 110, 113, 116, 118). In fact, Plaintiff Reid Bench stated that he was not interested in any oil, gas, or mineral rights, but rather desired merely a place to live away from the city (T. 116).

The parties continued to believe that the said oil, gas, and mineral rights were not to be transferred with the property. On two occasions in 1968 and 1969, Plaintiff Reid Bench offered to purchase a portion of Mrs. Pace's oil, gas, and mineral rights, but she refused to sell (T. 82).

[1] **"T" refers to Transcript of the testimony and "Ex." refers to Exhibit.**

Plaintiffs fell behind in their rental payments (See Ex. 19, T. 52, 58), and on April 1, 1969, Plaintiffs agreed in writing to pay extra charges incurred by Defendant for interest arising through Plaintiffs failure to make timely payments under the lease-option agreement (Ex. 4). Plaintiffs never tendered payment of those excess charges (T. 59).

On January 8, 1971, Plaintiff Reid Bench presented a check in the amount of $2,000.00 to Defendant (Exs. 15, 18) in an attempt to exercise the option, and the parties agreed that a new real estate sales agreement for the sale of the property was necessary to complete the transaction and commenced negotiations to arrive at such a new agreement (see Exs. 6, 7, 8, 17, and 20). However, the parties were unable to agree upon the terms of such new agreement, and they mutually agreed to return to the lease arrangement (Ex. 17, 10, 13, 12). On April 5, 1971, Plaintiffs were advised by Defendant that the $2,000.00 payment did not constitute a valid exercise of the option and that either a new contract must be executed or the Plaintiffs would continue on the lease (Ex. 7). On June 2, 1971, the $2,000.00 was sent by Defendant to Plaintiffs (Ex. 17). By letter dated June 15, 1971, Plaintiffs accepted the remitted $2,000.00, acquiesced in their return to the lease arrangement, and expressed the hope that some agreement could eventually be worked out (Ex. 10).

In the summer of 1972, Plaintiffs executed a ratification of Mrs. Pace's oil lease and a proof of possession form, disclaiming any right to any oil under the subject property (Exs. 12, 13).

On separate occasions in the fall of 1973, Plaintiff Reid Bench advised two disinterested parties that he never intended to purchase the oil, gas, and mineral rights from Mrs. Pace and that he knew that she never intended to sell them (T. 122, 129, 145). He further stated that he first was given the idea that he could claim the oil rights by a lawyer he had talked to concerning the lease seven years after the initial signing took place (T. 121, 122, 145).

It was clear from the evidence as a whole that Mrs. Pace did not know that the Plaintiffs claimed oil, gas, and mineral rights in the property until she was served with a copy of the complaint in this action. (T. 196, 197.) The Court so found (Finding of Fact No. 5).

Plaintiffs never complied with the requirements of the option, and the lease eventually expired on September 15, 1973, approximately nine months after this lawsuit was filed.

Defendant served a notice to quit upon the Plaintiffs in September, 1973, but Plaintiffs failed to vacate the premises (Ex. 21).

ARGUMENT

1. The Standard of Review In This Case Is Whether The Findings Of The Trial Court Are Supported By Competent Evidence.

All of the findings of the trial court in this case are buttressed by testimony of multiple witnesses and var-

ious documents. If the evidence admitted at the trial is competent evidence (which it is), there can be no question that the trial court's findings must be upheld. Plaintiffs-Appellants' main argument in this case is that the trial court should not have admitted some evidence at the trial which showed the true intent of the parties and their mutual mistake. If this court rules that the evidence admitted by the trial court was properly admitted, then this case should be affirmed. *Howarth v. Ostergaard,* 30 Utah 2d 183, 515 P.2d 442 (1973); *Olsen v. Park Daughters Inv. Co.,* 29 Utah 2d 421, 511 P.2d 145 (1973).

2. The Trial Court Properly Admitted Parol Evidence In This Case, And The Contract Was Properly Reformed.

In response to the complaint filed by Appellants, the Defendant answered that there had been a mutual mistake or fraud in the execution of the original lease-option agreement. Plaintiffs objected to such a defense and moved for a summary judgment.

Judge George E. Ballif entered a written ruling on this motion on September 19, 1973,[2] stating in part:

> Although the parol evidence rule would ordinarily fix the operation of a written agreement to the express language contained within the four corners of the instrument and those things flowing therefrom by operation of law, the defend-

[2]The record is not numbered by page and, therefore, the reference to the record must be made by document title and date.

ant's claim of a mutual mistake of fact or fraud in the failure of the writing to provide for a reservation of minerals where defendant claims she relied upon plaintiffs and counsel secured by plaintiffs to reduce the agreement, including the reservation, to writing could, if proved, result in a reformation of the agreement or an estoppel against plaintiffs' enforcement of same.

At trial, Judge Sorensen concurred with Judge Ballif's decision and admitted testimony offered by Defendant to show the existence of such mutual mistake or fraud. The pertinent portions of that testimony are set out below:

> A. [Mrs. Pace] Well, he wanted to lease the farm with option to buy, and I told him at the time, I said "Now, Mr. Bench, I want you to understand there will be no mineral rights to go with the place." And he said, "I agree — or I understand that." (T. 78)
>
> * * *
>
> He handed me the pen, the contract, and I glanced over it, looked over it the best I could with what time I had, and I took the pen in my hand and was going to sign, and I looked at him, and I said, "Mr. Bench, I want you to understand at this price there is no oil or mineral rights to go with the place." And he said, "I understand, and I am not interested in your oil rights." (T. 81)
>
> * * *
>
> Well, yes, because it was agreed that the oil right was to go with me. He was to get the farm only. (T. 110).

The Plaintiff, Mr. Bench, testified as follows:

> Q [by Mr. Boyden]: At the time you had your arrangement with Mrs. Pace in 1965, did you then intend that you were leasing the minerals?
>
> A [by Mr. Bench]: I never thought about minerals, oil or gas. (T. 153-54).

Plaintiff Mrs. Bench was not called to testify during the trial because of alleged illness.

It has been repeatedly held that the parol evidence is admissible in a case such as the one at hand. The "black letter" rule is clearly stated by Professor Corbin, *Contracts,* 536 (one vol. ed.):

> Before the legal operation of any agreement can be determined, however definitely it may be embodied in a written "integration," it must be interpreted by the court. For this process of interpretation, the "parol evidence rule" does not exclude evidence of prior communications and understandings (although there may be some other limitations on the extent to which such evidence may be used). Until a contract has been interpreted, the court cannot know whether there is an inconsistency between it and other agreements, oral or written, prior or subsequent. Before interpretation, a court cannot know what it is that cannot be "varied or contradicted." *In addition, the "rule does not purport to exclude any testimony to prove fraud, illegality, accident, or mistake; it does not prevent rescission or a decree for reformation and enforcement."* [Emphasis added.]

Utah cases have followed this rule. Even the principal case cited in Plaintiffs' Brief concurs with the rule as stated by Professor Corbin:

> Parol evidence may be received to clarify ambiguous language in a contract, to show what the agreement was relative to filling in blanks, *and to supply omitted terms which were agreed upon but inadvertently left out of the written agreement. E. A. Strout Western Realty Agency, Inc. v. Broderick,* .... Utah 2d ...., 522 P.2d 144 (1974). [Emphasis added.]

In the present case, there was a clear intent to reserve the mineral rights to the Defendant. The parties relied upon that intent for seven years. Defendant asked the Court for reformation as soon as Plaintiffs changed their position by filing the instant suit and thereby making the need for the reservation clear.

Other Utah cases follow the rule cited above. See *Peterson v. Eldredge,* 122 Utah 96, 246 P.2d 886, 888 (1952); *Cram v. Reynolds,* 55 Utah 384, 186 Pac. 100 (1919); *Fox Film Corp. v. Ogden Theater Co.,* 82 Utah 279, 17 P.2d 297 (1932); *Nordfors v. Knight,* 90 Utah 114, 60 P.2d 1115 (1936); *Last Chance Ranch v. Erickson,* 82 Utah 475, 25 P.2d 952 (1933); *Naisbitt v. Hodges,* 6 Utah 2d 116, 307 P.2d 620 (1957); *Rosenbraugh v. Branch,* 117 Utah 74, 213 P.2d 333 (1949); *Forrester v. Cook,* 77 Utah 137, 252 Pac. 206 (1930); *Kier v. Condrach,* 25 Utah 2d 139, 478 P.2d 327 (1970); and *Gray v. Gray,* 108 Utah 390, 160 P.2d 432 (1945).

And see the similar case of *Nelson v. Daugherty,* 357 P.2d 425, 432-33 (Okl. 1960), where the Court found

a mutual mistake in a conveyance dealing with the reservation of mineral rights. The Court said:

> In such case we have, following our earlier cases, held in Fabbro v. Reese, 206 Okl. 665, 246 P.2d 324, 325, in the syllabus as follows:
>
> "1. In an action for the reformation of a deed or contract of sale, parol evidence is admissible to show the parties' intent and mutual mistake.
>
> "2. Evidence to sustain a judgment reforming a written contract must be clear, unequivocal, and decisive, but this does not mean that it must be uncontradicted; and the judgment of the trial court in such an action, where the evidence is conflicting, should be given weight, and should be affirmed on appeal, unless the appellate court is satisfied that the standard of proof required has not been met and the conclusion reached is wrong."

In the body of the opinion, that court said:

> "In Harrell v. Nash, 192 Okl. 95, 133 P.2d 748, 750, we said:
>
> "Evidence to sustain a judgment reforming a written contract must be clear, unequivocal, and decisive, but does not mean that it must be uncontradicted; and the judgment of the trial court in such an action, reforming the contract, where the evidence is conflicting should be given weight, and should be affirmed on appeal, unless the appellate court is satisfied that the standard of proof required has not been met and the conclusion reached is wrong."
>
> In Crabb v. Chisum, 183 Okl. 138, 80 P.2d 653, we considered a case where the factual situation was very similar to that involved in the

instant case. The mistake in the notes in that case was due to an error on the part of the scrivener, which was not noticed by the plaintiff until long subsequent to the date of the execution of the notes. In that case we affirmed the judgment of the trial court granting reformation, although the evidence was conflicting, pointing out that the trial court, which had the witnesses before it and had an opportunity to observe their demeanor and to determine their credibility, had decided this issue in favor of the plaintiffs.

In Walter v. Myers, 206 Okl. 100, 241 P.2d 393, 394 (1952), paragraphs 1, 2 and 3 of the syllabus it was stated:

"1. In a suit for reformation of a deed it is competent to show the conduct, declarations and statements of the parties just before and at the time of the execution of the instruments.

"2. An action for the reformation of a deed, based upon mistake of fact, is an action of equitable cognizance. The general rule is that when, because of a mistake of fact, an instrument does not express the true intention of the parties, equity will correct such mistake unless the rights of third parties intervene."

In the present case, no third party rights were impaired by the parties' mistake. Thus, this case is an appropriate one for equitable relief.

In *Intermountain Farmers Assn. v. Peart,* 30 Utah 2d 201, 515 P.2d 614 (1973), this Court affirmed a decision by Judge Sorensen wherein he admitted certain parol evidence to show that a mutual mistake had been committed. This Court held:

> It should be noted that the plaintiff intended to convey two acres and the defendants *did not expect to receive* more than two acres. It thus appears that there was a mutual mistake in the conveyance which described five acres. . . .
>
> The trial court having found the issues in favor of the plaintiff on its request to have the deed reformed and against the defendants on their counterclaim, and the findings of the court being supported by the evidence, we find no basis to interfere with the findings or the judgment entered by the court below. [Emphasis added.]

In the present case, as in *Peart,* the Appellants did not expect to receive what they now claim through litigation. This fact was proved not only by the parol evidence involving matters preceding the execution of the lease, but also by the additional testimony of Mrs. Pace, Mr. Burdick, and Mr. Anderton in addition to the oil lease ratification and affidavit signed by the Plaintiffs. These matters of evidence are more fully discussed below. They show clearly that the Plaintiffs considered themselves as lessees of the surface with no right or interest in the mineral rights.

Appellants' efforts to employ the parol evidence rule to hide the true and concurring intent of the parties are repugnant to law and equity. As aptly stated in the oft-cited case of *Andersonian Inv. Co. v. Wade,* 184 Pac. 327, 330 (Wash. 1919):

> The parol evidence rule is intended to prevent, not promote, frauds, and it would be a fraud to allow a party to a written agreement to enforce it as written when he has agreed not to do, where

the other on the faith of the agreement, has acted thereupon to his detriment.

The cases cited by Appellants on the subject of parol evidence are distinguishable from the case at bar. For example, the case of *E. A. Strout Western Realty Agency, Inc. v. Broderick, supra,* as cited by Plaintiffs is clearly distinguished from the case at bar. In that case, the attempt was to change the clear terms of a written instrument. In the present case, there is not a word in the instrument about oil or minerals. Plaintiffs attempt to rely on a presumption of which Plaintiffs were not even aware until they consulted lawyers on the subject.

The case of *Rainford v. Rytting,* 22 Utah 2d 252, 451 P.2d 769 (1969), does not purport to give an exhaustive statement of the parol evidence rule. No issue of mistake or omitted terms was raised in that case, and the opinion cannot be deemed as precedent on issues not before the Court in this case. The inclusion of mistake and omitted terms as exceptions to the parol evidence rule in the subsequent *E. A. Strout* decision cited next above clearly evidences the non-general nature of Plaintiff's quotation from the *Rainford* case.

The case of *Jensen v. Rice,* 7 Utah 2d 276, 323 P.2d 259 (1958), concerned a claimed *unilateral* mistake in the execution of a conditional sales contract for the purchase of an automobile. The instant case concerns, as the trial court found, omitted terms resulting from the *mutual* mistake of the parties. As the *Jensen* decision

indicated, a court should first seek to determine the intention of the contracting parties; if that intention is embodied in the written contract, such contract will be enforced. If, as the trial court found herein, such intention is not embodied in the written contract as a result of mutual mistake, parol evidence is proper to enable the court to determine the intent. There having been no manifestation of assent in the written document on the issue of oil rights, the *Jensen* case cannot be controlling herein.

In the case of *Davidson v. Robbins,* 30 Utah 2d 338, 517 P.2d 1026 (1973), the Supreme Court held that no contract existed between the parties as a result of the alleged agreement's failure to include a sufficient legal description of the property to be conveyed to enable the court to grant specific performance. The distinction is drawn between identification of the interest conveyed by parol evidence and of using such evidence to supply a missing description. In the instant case there is no question as to the geographical location of the property involved; the question is one of identifying what interests were intended to pass with the described land. Parol evidence is properly allowed to identify the interest which the parties intended to pass when by mutual mistake the otherwise proper legal description did not expressly reserve such interests as were not intended to pass. See *E. A. Strout v. Broderick, supra.* The trial court properly identified the interest which was to pass as not including mineral rights. Such a result is not at variance with the holding of the *Davidson* case.

The case of *Clyde v. Eddington Canning Co.,* 10 Utah 2d 14, 347 P.2d 563 (1959), concerned an attempt to vary the clearly expressed intention on a personal guarantee by parol evidence on the basis of a unilateral mistake. That case has no precedential value where, as here, there is no express reservation of mineral rights and a finding of mutual mistake resulting in the omission. To the same effect is the case of *Lenman v. Jones,* 221 U.S. 51, 32 S.Ct. 18, 56 L.Ed. 89 (1911), which similarly involved only a claimed unilateral mistake.

There are numerous Utah cases dealing with reformation of an instrument on the ground of mutual mistake such as was present here. Plaintiffs-Appellants make no attempt to distinguish any of those cases. For example, see *Naisbitt v. Hodges,* 6 Utah 2d 116, 307 P.2d 620, 623 (1957), and cases cited therein:

> The guiding criteria are well established. *Mutual mistake of fact may be defined as error in reducing the concurring intentions of the parties to writing.* Peterson v. Paulson, 24 Wash. 2d 166, 163 P.2d 830 (1945).
>
> * * *
>
> This principle has consistently been applied in equity throughout the reformation of instrument cases. Sine v. Harper, 118 Utah 415, 222 P.2d 571; Gray v. Gray, 108 Utah 388, 160 P.2d 432; Nordfors v. Knight, 90 Utah 114, 60 P.2d 1115; George v. Fritsch Loan & Trust C., 69 Utah 460, 256 P.400; Cram v. Reynolds, 55 Utah 384, 186 P.100; Wherritt v. Dennis, 48 Utah 309, 159 P. 534; Weight v. Bailey, 45 Utah 584, 147 P. 899; Deseret National Bank v. Dinwoodey, 17 Utah 43,

53 P. 215; Ewing v. Keith, 16 Utah 312, 52 P.4. [Emphasis added.]

In the instant case, as under the *Naisbitt* language cited above, there was an error in reducing the plain and concurring intentions of the parties to writing. This is mutual mistake as the trial court properly found and serves as a correct basis for reforming the lease-option agreement.

In addition to the testimony of the Defendant, Mrs. Pace, coupled with the failure of the Plaintiff, Mr. Bench, to testify that he intended to lease with option to purchase the mineral rights of the property in question, Dawn Brown, a daughter of Defendant, testified that before the signing:

> My mother told Mr. Bench that the place was going for twenty thousand; that there would be no mineral rights; and ask him if he understood that, and he said, "Yes, I do. I am not interested in mineral rights. I just want to get my children out of the city." T. 116.

Carol Jameson testified that at the time of the signing:

> I remember Erma [Pace] saying — telling Mr. Bench that none of the oil went with it, and I remember Mr. Bench telling Erma that he wasn't interested in anything like that. T. 118.

Thus, the mutual mistake of fact, consisting of the error in reducing the concurring intentions of the parties to writing, occurred either when Plaintiff Bench failed

to properly instruct his attorney, or his attorney failed to clearly set down the intentions of the parties.

The contract does not employ the usual terms of conveying "the following described real estate." The contract stated,

> [T]he Owners have agreed to LEASE and subsequently SELL to the buyers *that certain one hundred twenty (120) acre irrigated farm* located approximately ten miles northwest of the city of Roosevelt, County of Duchesne, state of Utah, and more particularly described as follows:
>
> NE ¼ NE ¼; Sec. 28, T 1 S., R. 2W., U.S.M. and also E ½ SE ¼; Sec. 21, T. 1 S., R. 2W., U.S.M.
>
> *The Owners have agreed to lease the farm to the Buyers* with a guaranteed purchase option, the lease period not to exceed three (3) years beginning September 15, 1965. [Emphasis added.]

On cross-examination, Mrs. Pace testified:

> [I]t was agreed that the oil right was to go with me. He [Mr. Bench] was to get the *farm* only. (R. 10). [Emphasis added.]

A review of the document shows that this intent was expressed — at least partially.

> At any time during this three-year lease period, the Buyers shall have the option to "purchase" the *farm* on the following terms and conditions: . . . [Emphasis added.] (Ex. 21)

The reference to the *farm* as opposed to the more customary "above-described real estate" or "property de-

scribed above'' illustrates the parties' mistake and at the very least creates an ambiguity requiring further clarification. Mrs. Pace attempted to explain her mistake at the trial as follows (R. 113) :[3]

> Q [by Mr. Boyden]: Mrs. Pace, you stated to Mr. Black that at the time you entered into this lease, Exhibit 2, that you knew before you signed it that the mineral reserves ought to be — or that the minerals ought to be reserved. What did you mean by that?
>
> A. I meant we had talked it over and I figured that he knew they were to come to me. I didn't have any idea that he figured they went with the *farm*. [Emphasis added.]

Again, at T. 77, the question was asked,

> Q. Can you tell me what you meant by that [reference to ''farm'' in Ex. 2]?
>
> A. That was the *farm only*. [Emphasis added.]

---

[3]Although counsel for Appellants make repeated reference to a certain question asked by Mr. Black regarding Mrs. Pace's knowledge of the failure to have an express mineral reservation in the contract (App. Br. 6, 32, 55), they conspicuously omit her explanation. When Mr. Black received his answer, he abruptly changed subjects because it was apparent she was not truly expressing her thoughts. (T. 110). It was on redirect examination that Mrs. Pace was given her first opportunity to explain her answer (T. 113). In fair and proper sequence the full answer is as follows:

(T. 110)

Q: You were aware very early in the proceedings of the failure to have the reservation of oil and gas rights in the document, were you not?

A: I was aware that it should have been in there before I ever signed it.

* * *

(T. 113)

Q: . . . What did you mean by that?

A: I meant we had talked it over and I figured that he knew they were to come to me. I didn't have any idea that he figured they went with the farm.

Thus, to the parties' understanding, the lease-option agreement *did* reserve the questioned oil, gas, and mineral rights to Mrs. Pace and gave an option to the Plaintiffs to buy only the *farm* — without any mineral rights.

This can also be seen by the usage of the term "farm" which was carried over to the lease extension agreement signed by both parties on May 22, 1967, and which provided in part (Ex. 16):

> Be it known that as of this date, May 22, 1967, the undersigned parties to a lease agreement regarding a *farm* located in Duchesne County . . . [Emphasis added.]

There is no doubt in light of the overwhelming weight of the evidence that the parties both possessed "concurring intentions" on this point. In Mr. Bench's letter agreeing to return to the rental arrangement, he stated:

> It is only our desire and intention to purchase the *farm* as per our original lease-purchase agreement and the terms there outlined (Ex. 10). [Emphasis added.]

The parties clearly knew that they did not intend to include oil, gas, and mineral rights in the transaction. They merely intended to lease the farm — or the surface — without the minerals.

To the extent that the Agreement should have contained words more explicitly reserving mineral rights to the Defendant, the parties were mistaken. But neither the Plaintiffs nor the Defendant was aware of this

mistake at the date of execution of the contract. The dispute was created at a later date as hereinbefore explained.

3. The Subsequent Conduct Of The Parties Showed Their Intent To Reserve The Oil, Gas, And Mineral Rights To The Defendant.

In addition to the evidence which was admitted to show the intent of the parties at the time the lease-option was executed, other corroborating evidence was admitted which further demonstrated that the intent of the parties was to reserve the oil, gas, and mineral rights to the Defendant, Mrs. Pace.

Thus, even if all prior and contemporaneous testimony were disregarded, there would still be ample evidence remaining to clearly show the parties' intent and require reformation within the rule as established by this court in *Naisbitt, supra.*

In *Naisbitt,* the Court stated:

> The sufficiency of the evidence in this case cannot be doubted when viewed in its entirety and in light of the findings of the trial court.

In *Naisbitt,* the Court then itemized what the record disclosed. We follow the same procedure and limit references only to matters occurring after the signing of the lease.

First, Mrs. Pace testified that on two occasions long after the lease was signed, Mr. Bench sought to

buy some of her interest in the oil rights to the property. She testified:

> There was twice when he asked me if I could change my mind or wouldn't change my mind about the oil rights. (T. 82.)

These occasions occurred in 1968 and 1969 when Mr. Bench had stopped at Mrs. Pace's house to make his rental payments (T. 82).

Second, and very importantly, two independent witnesses also testified that Mr. Bench had informed them as late as the fall of 1973 that he had never intended to buy any oil rights from Mrs. Pace and that he knew that she never intended to sell such rights, but only due to the advice of an attorney had he decided to try to take them from her. Max Burdick, a Roosevelt businessman, testified concerning a conversation with Plaintiff Bench occurring in September, 1973 (T. 122-23):

> He [Mr. Bench] said he remembered that Erma [Pace] had told him in the beginning that she didn't want to sell her oil rights. And I told him I knew this was true, because I had tried to buy them previously to that and she had refused to sell them to me. She said she wouldn't sell for no price. And then he told me, he said, that he went to see his attorneys in Salt Lake and they had talked. He went to see them about some kind of fire insurance on the old [Pace] house or something like this. And they had found a flaw in the contract and told him they figured they could get the oil rights for him.
>
> * * *

Testimony on the fee arrangement between the attorney and Mr. Bench was stricken by the Court. (T. 122)

> I told him [Mr. Bench] I had offered to buy the oil rights previously to that time from Erma [Mrs. Pace] and I would have paid her more than he paid for the whole ranch just for the oil rights if she would have sold them, but she absolutely refused to sell them for any price.

Mr. Burdick further testified:

> Mr. Bench also told me that he knew at the time that him and Mrs. Pace made the contract that he knew he wasn't buying the oil rights, and he knew — that he didn't know this until his attorneys — until he talked to his attorneys later.

Tom Anderton, another businessman in the area, also had a conversation with Mr. Bench in September, 1973. Mr. Anderton stated:

> Now we had a lengthy conversation also in which Reid [Bench] told me that when the contract was entered into there was no mineral rights that was transferred with the property and he knew that....
>
> * * *
>
> Okay, and he [Mr. Bench] said that he had some negotiations with Erma [Pace] on her property to renegotiate the mineral rights, and he could not get any negotiations; therefore, he was going to sue for the full mineral rights on the property.... (T. 129.)

Third, in the summer of 1972, the Plaintiffs themselves signed two documents stating that they had no claim to the oil rights in the subject property which oil rights had been leased by Mrs. Pace over ten years

before. Exhibit 12, executed on June 1, 1972, by Plaintiff, states in relevant part:

> The undersigned (Reid D. Bench), of lawful age, being first duly sworn, deposes and says: That he occupies the above described land *as lessee of surface,* with option to purchase, from Erma Pace, the owner thereof; that he became such lessee on the 15th day of September, 1965, and that his tenancy is for eight years and will expire on the 15th day of September, 1973. That *he claims no title to said land* other than as tenant with option to purchase as aforesaid, and does hereby state and declare that *his right to possession in no way interferes with the right to said owner to lease said lands for oil and gas development purposes,* and that his possession as tenant is subject to the rights of any lessee or assignee under any oil and/or gas lease executed by such owner. [Emphasis added.]

Plaintiff later claimed that he intended to delete the term "lessee of the surface" but omitted to do so (T. 46). The trial court evidently did not credit that testimony. But even if that term were deleted, it is clear from the balance of the affidavit that the Plaintiffs claimed no right to the oil rights.

Similarly, on July 6, 1972, Plaintiffs executed a ratification of the oil lease renewal signed by Mrs. Pace on June 30, 1971. That ratification states in part (Ex. 13):

> The undersigned [Plaintiffs] . . . do hereby ratify, approve and confirm that certain oil and gas lease dated June 30, 1971, executed by Erma Marie Pace. . . ; the undersigned hereby fully recognize said oil and gas lease as being in full

> force and effect as though the undersigned had personally signed, sealed and acknowledged the same. The undersigned are tenants with option to purchase from Erma Marie Pace.

The subject oil lease (Ex. 11) provided that all the oil royalties from the subject property were to be paid to Mrs. Pace. The Plaintiffs clearly consented to that arrangement and plainly considered themselves as mere tenants with an unexercised option to purchase. These documents were executed nearly seven years after the original lease was executed. They indicate that Plaintiffs believed they had no interest in oil rights even then. They further show that Plaintiffs considered themselves as tenants under a lease-option agreement expiring on September 15, 1973.

Thus, on the basis of the foregoing testimony and evidence the Trial Court found:

> By clear, satisfactory, definite and convincing evidence, it was established that the lease and option contract through mutual mistake omitted the reservation of the minerals and failed to conform to the intent of the parties at the time of the execution of the instrument in that the oil, gas, and mineral rights were not reserved to the Defendant. (Finding of Fact No. 4).

In light of the overwhelming weight of the evidence referred to above, there was no doubt that the parties had erroneously omitted the express reservation of mineral rights from the lease-option agreement. The Trial Court properly reformed the agreement to conform to the parties' intent.

4. The Statute Of Frauds Does Not Prevent The Reformation Of The Lease-Option In This Case.

Plaintiffs-Appellants urge upon this Court that the equity powers of reformation of instruments are limited by the Statute of Frauds. No case is cited which supports this unique assertion. All of the cases cited above dealing with the reformation of documents in real estate transactions would tend to controvert Appellants' argument.

The old case of *Papanickolas v. Sampson,* 73 Utah 404, 272 Pac. 856 (1929), which is cited and quoted by Appellants, does not support Appellants' theory. *Papanickolas* was not an action to reform a document so that it would conform to the parties' intent, but rather it involved an attempt by one party to enforce an oral contract for the sale of land. Upon a directed verdict refusing to require such sale, the Court found that there was no substantial evidence supporting the Appellant and, therefore, affirmed the lower court's decision. Specifically, the Court found that there was no evidence of mistake or fraudulent intent as there is in the present case.

Indeed, Appellants seem to ignore the rule that the Statute of Frauds will not be enforced where the result would be to perpetrate a fraud. See *Easton v. Wycoff,* 4 Utah 2d 386, 332 P.2d 332, 334 (1956), which is incorrectly cited by Appellants. The *Easton* case points out that the Statute of Frauds would not be applied in

a case where such application of the Statute would operate to defraud.

It should be noted that in this case, it was not necessary that the trial court find the Appellants guilty of fraud. But, if there were no mistake, as Appellants contend, and if Appellants knew the contract conveyed minerals contrary to their express agreement, a court of equity surely would not assist in such an effort to defraud.

It has been clear from the inception of this case that Plaintiffs-Appellants have desired to utilize the Statute of Frauds (and the parol evidence rule) to keep from the trier of fact certain evidence demonstrating the true intent of the parties. While Justice may be blind, She is not ignorant or insensitive to truth, and Appellants' efforts to conceal the truth in this case are so obvious that they could not possibly go unnoticed. In fact, Appellants' efforts at concealment only serve to call attention to the conduct of the Plaintiffs in seeking to obtain from a widow more than their bargain provided for. No legal principle requires the application of the Statute of Frauds to perpetrate such an injustice. Utah cases, including even the cases cited by Plaintiffs-Appellants, point out that such a result will not be permitted by Utah courts.

5. Plaintiffs-Appellants' Position Regarding Fraud Is A Strawman Argument.

The findings of fact in this case make no mention of fraud. Yet, Plaintiffs-Appellants devote twelve pages of their Brief to argue that there was no fraud.

Defendant raised the issue of fraud in her Answer as an alternative defense along with the defense of mistake. In short, Defendant's position was simply that either the parties made a mutual mistake or else Defendant made a mistake and Plaintiffs committed fraud. The Trial Court found by clear and convincing evidence that there had been a mutual mistake. Thus, the issue of fraud as belabored in Plaintiffs' Brief is merely a strawman beyond the trial court's decision.

It was not necessary for the trial court to find fraud because it appeared that the failure to include an express mineral reservation in the contract was a mutual mistake.

Nevertheless, if there were no mistake, there would be fraud, and specific performance being an equitable action Plaintiffs must do equity. In view of the Plaintiffs' repeated statements that he knew he was not leasing or buying the mineral rights, equity forbids him to gainsay his own acts and assertions.

Perhaps two of the most basic rules of equity are that he who seeks equity must do equity (*Carbon Canal Co. v. Sanpete Water Users Ass'n*, 19 Utah 2d 6, 425 P.2d 405 (1967)), and that equitable relief will be de-

nied where the Plaintiff lacks "clean hands" or where he is guilty of deceit or an impure motive (see, *e.g., Iven v. Roder,* 431 P.2d 321 (Okl. 1967)).

Suffice it to say, as was indicated in the *Andersonian* case quoted above, "it would be a fraud to allow a party to a written agreement to enforce it as written when he has agreed not to do so." If there were no mutual mistake here, there would be a fraud.

6. The Lease And Option Expired Without Being Exercised And Plaintiffs Have No Remaining Interest In The Property.

The entire foregoing discussion is mooted to some extent by the fact that the Plaintiffs never properly exercised their option and the lease agreement expired as of September 15, 1973. The evidence admitted during the trial clearly established this fact. A review of that evidence demonstrates that the Trial Court properly concluded:

> Regardless of whether Plaintiffs properly exercised their option to purchase, they acquiesced in the return of their down payment and agreed to continue under the lease agreement and their right to exercise their option expired with the termination of the lease extension on September 15, 1973. (Conclusions of Law No. 6.)

The lease-option agreement specifically provided, "It is agreed and understood that the payment of the above rentals shall be a consideration for the granting of the option to purchase contained herein" (Ex. 2).

Mr. Bench admitted during his testimony that he had not made the specified payments in a timely fashion (T. 52, 58). Exhibit 19, which was prepared by Mr. Bench, revealed that throughout virtually the entire first six years of the lease period, Mr. Bench was in arrears, often by several hundred dollars.

On April 1, 1969, Mr. Bench agreed to pay the additional charges incurred by Mrs. Pace because of Mr. Bench's delinquent rental payments (Ex. 4). Mr. Bench never paid or tendered those additional charges (T. 59).

On January 8, 1971, Mr. Bench and Mrs. Pace discussed the sale of the property. At that time, Mr. Bench presented a check to Mrs. Pace in the amount of $2,000.00, but Mr. Bench did not tender payment of the late charges, nor did he tender any pro-rated payment of the $600.00 annual farm lease rental (T. 84).

The parties agreed to enter into a new agreement which would provide for the sale of the subject property. Mrs. Pace presented a proposal (Ex. 6) and Mrs. Bench also presented a proposal in her own handwriting (Ex. 20). Both parties had raised objections concerning the initial lease-option agreement.

Mr. Bench delayed in signing the new agreement. Finally, on April 5, 1971, Mr. Bench was notified that if a new agreement could not be reached, the former lease arrangement would continue (Ex. 7).

Mr. Bench responded to that notice by listing his objections to the new proposed agreement (Ex. 8). Those

objections included the failure of the new agreement to accumulate past rent payments as payments against principal and the requirement that he pay property and water taxes. Mr. Bench suggested the need for further discussions, but did not object in any way to the reservation of mineral rights which was expressly set forth in the new proposal.

On June 2, 1971, Mrs. Pace returned the $2,000.00 payment to Mr. Bench, advising him:

> [T]he place just isn't for sale without a signed sale contract. You are now back on the lease contract. (Ex. 17).

On June 15, 1971, Mr. Bench wrote to Mrs. Pace (Ex. 10) and stated:

> In accordance with your letter dated June 2nd [Ex. 17] and Mr. Beaslins of May 4 [Ex. 7] I am enclosing $1,200.00. This will pay the full amount due under the lease agreement for the year 1971. I plan to invest the balance of the funds you returned to me in hopes of being able to again come forward with at least a $2,000.00 down payment before Jan. 1972.
>
> * * *

Mr. Bench also noted several objections to the proposed contract, but again failed to raise any objection concerning mineral rights.

Mr. Bench continued to make rent payments, but did not "come forward with" the down payment as he indicated in his letter.

On June 1, 1972, Mr. Bench signed a proof of possession (Ex. 12) wherein he admitted that he considered himself as a tenant with an option to purchase. On July 7, 1972, both Mr. and Mrs. Bench signed a ratification agreement approving Mrs. Pace's oil lease of the subject property and again stated that they were tenants with an option to purchase (Ex. 13).

The foregoing evidence illustrates the following points:

(1) The Plaintiffs failed to provide the consideration required in the lease-option agreement and therefore precluded the possibility of their exercise of the option.

(2) The Plaintiffs never tendered a sufficient amount of money to exercise their option. They never tendered late charges or the prorated farm rental due.

(3) The parties agreed that an additional agreement was required to culminate the transaction.[4]

(4) The parties were unable to agree upon terms, but the question of oil rights was never objected to by Plaintiffs.

(5) The Plaintiffs accepted the return of their moneys and agreed to return to the lease arrangement.

(6) Plaintiffs considered themselves as tenants with an unxercised option to purchase as late as July 7, 1972.

[4]The original lease-option agreement was defective in that the formula for payment of the purchase price did not require the eventual payment of the full price; no method of conveyance was specified; and the property description was inadequate or uncertain. Many other usual terms were omitted. Although these were not essential, they all formed the basis for the parties' agreement that a new contract was needed.

The lease finally expired as of September 15, 1973. Defendant served a notice to quit at that time (Ex. 21).

Thus, the Trial Court was correct in ruling that the lease-option had expired and that the Plaintiffs have no remaining interest in the subject property. Because this is true, it is academic whether the lease-option reserved the mineral rights. Since Plaintiffs now have no right under that expired lease, the question of the mineral reservation is mooted.

Appellants argue in their brief (pp. 50-54) that the option was exercised. The foregoing facts upon which the trial court relied showed clearly that the option was never properly exercised (Findings of Fact No. 11 and Conclusion of Law No. 5). The language of the lease-option agreement was far from clear, contrary to what Appellants suggest. But, more importantly, Appellants never tendered a sufficient sum to exercise their option, nor did they make their rental payments timely.

In addition, the parties agreed to prepare a new agreement. The Plaintiffs and the Defendant proposed several additional new terms for the new agreement.

Most importantly, when agreement upon the new contract appeared unlikely, the parties agreed in writing to continue to be governed by the lease arrangement (Exs. 6, 7, 8, 17, 20, 10). Appellants conspicuously avoid referring to that agreement in their Brief. Nevertheless, the agreement was made in writing and rental payments were made pursuant to that agreement (Ex. 19,

T. 52, 58). Plaintiffs signed two additional documents confirming their intentions to continue their status as lessees. (Exs. 12, 13).

Appellants attempt to excuse their failure to exercise their option by arguing that the Defendant would have rejected such an effort. They presented no evidence to prove such an assertion. The trial court weighed the evidence which was presented and found contrary to the Plaintiffs on this issue. It is untimely and improper to suggest on appeal that evidence should now be imagined that a proper tender could have or would have been made by the Plaintiffs and also that the Defendants should be presumed to have rejected any proper tender.

Moreover, Plaintiffs' assertion (at p. 53 of their Brief) that they in effect could abrogate the agreement of the parties to follow the lease arrangement by the making of allegations in a complaint for specific performance are equally unsupportable. No case law stands for such a proposition and the trial court obviously did not so find.

The facts omitted by Plaintiffs in their argument are crucial to this issue. Those facts were found by the trial court to be contrary to Plaintiffs' current position on appeal. Those findings should not now be disturbed by hypothetical arguments.

7. The Other Issues Raised by Plaintiffs-Appellants Are Without Merit.

a. *Statute of Limitations.*

Plaintiffs-Appellants suggested that the statute of limitations bars the defenses of fraud or mistake in this case. This argument is faulty in three respects: First, the cases cited do not stand for the proposition that the statute of limitations bars the *defenses* of fraud and mistake. The cases merely state that a cause of action is barred.

The ultimate purpose of the limitation law is thus to bar *actions* rather than to suppress or deny matters of defense. This purpose is aptly stated in the case of *Liter v. Hoagland,* 305 Ky. 329, 204 S.W. 2d 219, 220 (1947), stating:

> Limitation law is not intended to bar nor smother any mere defense of a party so as to compel him to stand dumb and mute while his antagonist bludgeons his head with every weapon in the book of legal, offensive warfare.

The rule is well-settled in other jurisdictions, including Utah, that such statutes are not applicable to defenses, but apply only where affirmative relief is sought. See generally, 78 A.L.R. 1074 and the numerous cases cited therein.

The above general rule is particularly applied in cases where the statute of limitations is pleaded as a defense to fraud. See *Miles v. Parkinson,* 196 Okl. 414, 165 P.2d 644, 646 (1946), which states the general rule

that the statutes limiting actions after discovery of fraud apply only as against actions, and not defenses. That case involved an action to obtain title under a county commissioner's deed, where county commissioners sought to justify their action in refusing to deliver deed after sale of property acquired by county at tax resale had been consummated on the ground that the purchaser had practiced fraud in procuring the sale. The Court held that the commissioners were not precluded by statute of limitations from setting up other defense of fraud because they did not set up their defense until long after expiration of two years from date of discovering alleged fraud. Put another way:

> Limitations do not run against defenses; the statute of limitations is available only as a shield, not as a sword. *Dredge Corporation v. Wells Cargo, Inc.,* 80 Nev. 99, 389 P.2d 394, 396 (1964).

In accord is the case of *Styles v. Bodkin,* 43 Ca. 2d 839, 111 P.2d 675, 678 (1941), stating that makers of a note could defend action on the note on the ground of fraud and the defense would not be barred by latches or by limitation.

Utah is in line with the general rule that statutes of limitation apply to actions, not defenses. In *Stewart Livestock Company v. Ostler,* 105 U. 529, 144 P.2d 276, 284 (1943), the Court holds:

> Though a claim may be barred by the statute of limitations insofar as the right to recover a judgment is concerned, such claim may be set off against an adversary's claim.

* * *

> A creditor who takes security for payment without delivering full consideration which represented he was giving cannot plead statutes of limitation to a plea of partial failure of consideration.

Thus, *Ostler* allowed the defendant debtor's cross-demands against the plaintiff creditor to stand.

In short, raising the statute of limitations as a bar to defenses of fraud and mistake is a mere red herring designed to conceal the truth from the scales of justice. The Courts have rejected this type of concealment.

A second weakness in the statute of limitation argument arises from the fact that the first time the fraud or mistake in this case was brought to the attention of the Defendant was when the complaint was filed. The defenses were raised long before the expiration of a three-year period. Weighing the evidence, the Trial Court so found (Conclusions of Law, No. 4). Plaintiffs-Appellants incorrectly state that Mrs. Pace knew about the mistake (or fraud) in 1965. She testified that she thought the oil, gas, and mineral rights had been reserved to her because she was only conveying an interest in the "farm" (see R. 110, 113).

Thus, Mrs. Pace made her mistake in 1965 but did not know it had been made until the Plaintiffs sued her in late 1972. Her responsive pleading timely raised the defenses of fraud and mistake. She was not negligent, as Appellants incorrectly assert (at p. 38 of their Brief), in seeking to correct the mutual mistake.

Mrs. Pace was not schooled in the law and obviously did not have any idea Plaintiffs would seek to take her oil rights from her. Everything Plaintiffs did led her to believe that there was absolutely no problem in this regard until the complaint was filed.

A third weakness in the statute of limitations argument is found in the fact that Plaintiff failed to raise this issue in the pretrial hearing. It was not made a part of the pretrial order. Plaintiffs' counsel did not raise this issue until after the pretrial order had been entered and finalized and the trial set.

b. *Failure to Produce Son as a Witness.*

Defendant called three witnesses who testified concerning the pre-execution discussions and intent of the parties. Plaintiffs objected to that testimony at trial. Now, Plaintiffs assert that a further cumulative witness should have been called to testify to the same matters and that Defendant's failure to do so has some significance.

Defendant submits that this argument is totally without support and certainly does not in any way detract from the great weight of clear and convincing evidence already in the Record.

It might just as easily be asked why Plaintiff Mrs. Alta Bench did not testify or, if she really was unable to attend the trial, why her testimony was not brought in by way of deposition. A similar question could be

asked concerning the notary who, according to Plaintiff Bench (but denied by Mrs. Pace), witnessed the parties' signatures.

Moreover, nothing prevented the Plaintiffs from calling Aaron Pace as an adverse witness.

Appellants also argue (at p. 54 of their Brief) that Defendant failed to carry her burden of proof which was to show that *both* Mrs. Pace and her son, Aaron, had been mistaken. However, this argument is unfounded. The evidence which was admitted at the trial showed that Aaron Pace was present at the time the initial discussions were held and that he was in attendance when Mr. Bench and Mrs. Pace agreed that the mineral rights were not to be transferred. There was absolutely no evidence introduced which would in any way indicate that Aaron Pace had any understanding other than that which would flow from the discussions of the Plaintiffs and the Defendant.

CONCLUSION

When Appellants' efforts at obfuscation are stripped away, the simple facts of this case remain: Plaintiffs and Defendant never intended to include the oil, gas, and mineral rights as a part of the lease-option for the farm. Plaintiffs never properly exercised the option but did agree in writing, to return to lease basis.

The trial court was not deceived or thwarted by Plaintiffs' posture in this case. Upon competent, clear,

and convincing evidence, the trial court entered its findings and conclusions and judgment. It is submitted that the judgment of the trial court should be affirmed.

DATED: April 10, 1975

Respectfully submitted,

BOYDEN, KENNEDY, ROMNEY
& HOWARD

By John S. Boyden

By John Paul Kennedy

Attorneys for Defendant
Erma Marie Pace

1000 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Respondent Erma Pace were mailed to Mr. Richard Dibblee, Attorney for Plaintiffs-Appellants, 10 West Broadway, Salt Lake City, Utah 84101, this 10th day of April, 1975, by First Class, postage prepaid mail.

John S. Boyden